

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the
Insurance Agent's License
of Stephen M. Kiley

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on March 3, 1989 at the Office of Administrative Hearings, Fifth Floor, Flour Exchange Building, 310 Fourth Avenue South, Minneapolis, Minnesota. The final post-hearing memorandum was filed on March 27, 1989, at which time the record closed.

Gregory P. Huwe, Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Department of Commerce. Respondent, Stephen M. Kiley, 2443 Harriet Avenue South, Minneapolis, Minnesota 55405, appeared pro se.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Commerce shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Commissioner Michael A. Hatch, Department of Commerce, Fifth Floor, Metro Square Building, Seventh and Robert Streets, St. Paul, Minnesota 55101.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether Respondent is subject to disciplinary action pursuant to Minn. Stat. 60A.17, subds. 6 and 6c due to alleged violations of Minn. Stat. sec. 60A.17, subds. 6, 6c(a)(5), 6c(a)(9) and 17, and Minn. Rules pts. 2795.1000, 2795.1300 and 2795.1400.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Stephen M. Kiley is a licensed insurance agent in the State of Minnesota pursuant to Minn. Stat. 60A.17, with offices at 2443 Harriet Avenue South, Minneapolis, Minnesota. Mr. Kiley became an agent with the United American Insurance Company (UAIC) on March 27, 1987.

2. UAIC operates on a net basis and net premium system. Net basis means

that the agent's commission is taken out of the premium paid by the insure .
Net premium is the amount of premium due to UAIC after the agent's
commission

has been deducted. However, before deducting his commission, an agent must deposit the full amount of the premium into a business checking or savings account.

3. In November of 1987, Mr. Kiley sent a check to UAIC for \$3,327.30 with seven policy applications to cover the net premiums due UAIC. The check was returned Marked non-sufficient funds.

4. Ms. Mildred Johnson applied for a UAIC Medicare Supplement policy on December 3, 1987 through Stephen M. Kiley and paid him \$748 in cash to cover the premium. However, Ms. Johnson never received a policy from either Mr. Kiley or UAIC. UAIC does not have any record of Ms. Johnson's application or the premium being received. In late January, 1988, Linda Rosenau, Ms. Johnson's granddaughter, contacted the Minnesota Department of Commerce for assistance in this matter.

5. Mr. Kiley was terminated by UAIC on December 8, 1987. When Mr. Kiley was terminated, he owed UAIC \$10,712.95 from commission chargebacks where UAIC made refunds on his behalf and cases where Mr. Kiley's net premium checks were returned marked "non-sufficient funds".

6. On December 16, 1981, LAIC received a \$1,310 check from Mr. Kiley. Three insurance applications were received with the check but none of the insurance applications were for Ms. Johnson.

7. On January 25, 1988, Mr. Kiley sent UAIC a cashier's check for \$2,500, making partial restitution for the November, 1987 "NSF" check. After receipt of this payment, Mr. Kiley's balance with UAIC was a negative \$12,711.69. The balance represented refunds made on Mr. Kiley's behalf by UAIC and other net premium checks returned Marked non-sufficient funds.

8. On February 2, 1988, the Department of Commerce contacted Mr. Kiley regarding the Johnson matter. On February 26, 1988, Mr. Kiley responded, stating that Ms. Johnson's application and premium had been forwarded to UAIC. On March 17, 1988, Larry Hutchison, counsel for UAIC, sent an affidavit to the Department of Commerce which listed the policies that were issued from applications submitted to UAIC by agent Kiley. None of the applications were for Ms. Johnson.

9. On February 4, 1988, UAIC reimbursed \$748 to Ms. Johnson for the premium collected by Mr. Kiley. At the time that UAIC refunded the premium, it had not located an application for insurance or a premium submitted on behalf of Ms. Johnson. UAIC contacted Mr. Kiley and asked him to send a cashier's check making restitution of the funds. UAIC has never been

reimbursed this amount by Mr. Kiley. Under the terms of his contract, Mr. Kiley's commissions were forfeited by the wrongful withholding of monies due UAIC.

10. An insurance agent is required to keep a record of all transactions, clients' deposit slips, a cash ledger, and the date and amount of deposits and disbursements for each client. The agent must keep this information for six years and make it available to the Department of Commerce upon request. Mr. Kiley did not provide the Department of Commerce with documents that it requested concerning this matter.

11. Mr. Kiley does not keep separate records for new clients. Rather, the only records Mr. Kiley maintains are monthly bank statements.

12. Mr. Kiley admitted that he did not deposit the \$748 in cash that Ms. Johnson gave him into a business checking or savings account, but rather, he kept it to use for Christmas shopping.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Minnesota Department of Commerce have jurisdiction over this matter pursuant to Minn. Stat. sec. 60A.17, subd. 6d and 14 .50.

2. The Notice of Hearing was proper in this matter and all substantive and procedural requirements of law and rule have been complied with by the Department.

3 . The Minnesota Department of Commerce has proved by a preponderance of the evidence that Stephen M. Kiley violated Minn. Stat. 60A.17 subds. 6, 6c(a)(5), (9) and 17 and Minn. Rules pts. 2795.1000, 2795.1300 and 2795.1400.

4. Due to the violations found above, disciplinary action against Respondent's license is warranted.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

11 IS HEREBY RECOMMENDED that the Commissioner of Commerce take appropriate disciplinary action against Respondent's insurance agent's license.

Dated this 4th day of March, 1989.

PETER C. ERICKSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. No Transcript Prepared.

MEMORANDUM

Applicable Statutes and Rules

Section 60A.17, subd. 6. Persons who shall not be licensed as agents

No person shall be licensed by the commissioner as an insurance agent if the commissioner shall be satisfied that the person is incompetent or unqualified to act as an insurance agent, or that person does not in good faith intend to carry on the business of insurance agent, or intends to secure a license for the sole purpose of writing insurance upon the agent's own life or property; or that the person is untrustworthy or of bad moral character; or that the person has unreasonably failed to pay over to any insurer, agent or policyholder or member of any insurance company or association entitled thereto, the whole or any part of any premium or return premium, or monies or other thing of value in the agent's hands, arising out of any insurance transaction, and due or payable to or belonging to any policyholder or other person, firm or corporation; or that the person has willfully misrepresented to any person, firm or corporation the terms or conditions of any policy or contract of insurance of the financial standing or condition or manner of doing business of any insurer or agent; or that the person has deceived or defrauded, or attempted to deceive or defraud, any person, firm, or corporation in connection with any insurance transaction, or that the person has urged or procured any person, firm or corporation to lapse any policy or contract of insurance in any company or association which is now or has been licensed to do business in the state, to the damage of the person, firm or corporation, or that the person has violated any of the provisions of the laws of this state in any way relating to insurance or the transaction or negotiation of insurance, or insurance agents, or any lawful ruling of the commissioner.

Subd. 6c. Revocation--or Suspension of License.

(a) The commissioner may by order suspend or revoke an insurance agent's or agency's license issued to a natural person or impose a civil penalty appropriate to the offense not to exceed \$5,000 upon that licensee or both, if, after notice and hearing, the commissioner finds as to that licensee any one or more of the following conditions:

5 improperly withholding, misappropriating, or converting to the licensee's own use any money belonging to a policyholder, insurer, beneficiary, or other person, received by the licensee in the course of the licensee's insurance business;

(9) that the conduct of the agent's affairs under the license, the licensee has used fraudulent, coercive, or dishonest practices, or the licensee has been shown to be incompetent, untrustworthy or financially irresponsible;

Subd. 6d. Show Cause orders.

If the commissioner determines that one of the conditions listed in subdivision 6c exists, the commissioner may issue an order requiring a licensee or an applicant for a license to show cause why the license should not be revoked or the application denied. The order must be calculated to give reasonable notice of the time and place for hearing thereon, and must state the reasons for the entry of the order. The commissioner may by order summarily suspend a license pending final determination of an order to show cause. If a license is suspended pending final determination of an order to show cause, a hearing on the merits must be held within 30 days of the issuance of the order of suspension. All hearings must be conducted in accordance with chapter 14. After the hearing, the commissioner shall enter an order making a disposition of that matter as the facts require. If the licensee or applicant fails to appear at a hearing of which that person has been duly notified, the person is in default, and the proceeding may be determined against that person upon consideration of the order to show cause, the allegations of which may be deemed to be true. The commissioner may adopt rules of procedure concerning all proceedings conducted pursuant to this subdivision.

Subd. 17. Premiums.

All premiums or other monies received by an agent from an insured or an applicant for insurance must be forthwith deposited directly in a business checking, savings, or other similar account maintained by the agent or agency, unless the monies are forwarded directly to the designated insurer.

Minn. Rule 2795.1000 HIGH STANDARDS OF COMMERCIAL HONOR.

Every agent must observe high standards of commercial honor and just and equitable principles of trade in the conduct of the agent's insurance business.

Minn. Rule 2195.1300 RECEIPT OF CLIENT FUNDS

An agent who receives funds from a client in connection with an insurance transaction receives and holds those funds in a fiduciary capacity.

An agent holding funds of a client must, each month, provide to the client an itemized statement showing the amount of money held.

Minn. Rule 2795.1400 MANDATORY FINANCIAL RECORDS.

Subpart 1. Type of records . Every agent and agency must keep a record of all funds received for or from clients , including cash, notes, savings certificates, uncashed or uncollected checks , or other similar instruments . Insurers represented by exclusive agents may compile and maintain the financial records required by this part on their agents' behalf. The records must set forth the date funds were received, from whom received, the amount received, the date of deposit of the funds into the business account of the agent or agency, and the monthly balance of the account in which the funds are deposited. Each agent and agency must maintain a cash receipts journal and a cash disbursements journal, or similar records, in accordance with generally accepted accounting principles.

Subpart 2. Separate Records . Each agent and agency must keep a separate record for each client or transaction , accounting for all funds which have been deposited in the agent's business account. These records must set forth the information sufficient to identify the transaction and the parties thereto. At a minimum, each record must set forth:

- A. the date funds are deposited;
- B. the amount deposited.
- C. the date of each related disbursement;
- D. the check number of each related disbursement;
- E. the amount of each related disbursement; and
- F. a description of each disbursement.

Subpart 3. Examination of Records. All records must be maintained for at least six years, and must be available for examination by the commissioner or a designee in accordance with Minnesota Statutes, Section 60A.031.

DISCUSSION

Mildred Johnson applied for a UAIC Medicare Supplement policy in December of 1987 and paid the agent, Stephen Kiley, \$748 in cash to cover the cost of the premium. Ms. Johnson never received a copy of her policy and UAIC never

received a copy of Ms. Johnson's application. Mr. Kiley admitted that he did not deposit the \$748 in cash. Rather, he kept the money to go Christmas shopping. This act constitutes "improper misappropriating or converting to the licensee's own use, any money belonging to an insurer", in violation of

Minn. Stat. sec. 60A.17, subd. 6c(a)(5). In addition, Mr. Kiley has violated Minn. Rules pt. 2795.1300 which requires that an agent who receives client funds must hold them in a fiduciary capacity. By failing to deposit the \$748 in cash received from Ms. Johnson into a business checking or savings account, Mr. Kiley additionally violated Minn. Stat. 60A.17, subd. 17 which requires that any premiums received by an agent from an applicant for insurance must be deposited "directly" into a business checking or savings account.

The record in this matter shows clearly that Mr. Kiley failed to maintain financial records as required by Minn. Rules pt. 2795.1400. An insurance agent must keep records of all funds received from clients. These records must set forth the dates and amounts of deposits or disbursements. Further, Mr. Kiley did not comply with the Department of Commerce's request for production of documents. At the hearing, the only evidence presented by Mr. Kiley regarding financial record keeping was the fact that he kept monthly bank statements.

During his tenure with UAIC, Mr. Kiley continuously maintained a negative account balance due to checks returned marked non-sufficient funds or refunds made to clients on his behalf. It is clear that given the status of his accounts and the absence of adequate record keeping, Mr. Kiley has been shown to be untrustworthy and financially irresponsible in violation of Minn. Stat.

60A.17, subd. 6c(a)(9). Due to his irresponsibility, Mr. Kiley has failed to uphold the standards of commercial honor in violation of Minn. Rules pt. 2795.1000.

Mr. Kiley testified quite candidly at the hearing that he felt the Department of Commerce and United American Insurance Company were partly at fault for not providing the information he needed regarding record keeping and other financial responsibility requirements. The Judge points out that these "requirements" are contained in the statutes and rules which regulate the insurance industry and practice of insurance agents. The "requirements" should have been learned by Mr. Kiley in an insurance agent's certification course, industry updates issued by professional organizations, and continuing education. The Judge points out additionally that Mr. Kiley's shortcomings in this case do not seem to be due to purposeful dishonesty. Rather, Mr. Kiley's business practices fall far below the norm of what is required by the statutes and rules. If Mr. Kiley would agree to re-educate himself so that the

accepted norms would be followed, the Judge is of the opinion that he could maintain a satisfactory agency.

P. C. E.